# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA BAR ASSOCIATION

No. 238.

THE MILWAUKEE AND SAINT PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TIMOTHY KELLOGG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

**FILED NOVEMBER 16, 1874.**

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INDEX.


| | Original. | Print |
|---|---|---|
| Transcript | 4 | 1 |
| Petition | 4 | 1 |
| Original notice | 14 | 4 |
| Petition for removal | 16 | 4 |
| Bond | 19 | 5 |
| Record-entry | 21 | 6 |
| Certificate of clerk | 22 | 6 |
| Continuance, (record-entry, May 23, 1872) | 23 | 6 |
| Motion and affidavits for continuance | 24 | 7 |
| Objections to affidavits for continuance | 27 | 7 |
| Continuance, (record-entry, October 19, 1872) | 30 | 8 |
| Record-entry, May 15, 1873 | 31 | 8 |
| Record-entry, May 16, 1873 | 33 | 9 |
| Record-entry, May 17, 1873 | 34 | 9 |
| Record-entry, May 19, 1873 | 35 | 9 |
| Amended petition | 37 | 9 |
| Stipulation of parties | 60 | 16 |
| Continuance, (record-entry, October 15, 1873) | 62 | 17 |
| Assignment of cause for trial, (record-entry, October 17, 1873) | 63 | 17 |
| Answer to amended petition | 64 | 17 |
| Stipulation of parties | 66 | 18 |
| Replication | 67 | 18 |
| Jury impaneled, (record-entry, May 14, 1874) | 68 | 18 |
| Record-entry, May 15, 1874 | 70 | 19 |
| Verdict of jury, (record-entry, May 16, 1874) | 71 | 19 |
| Assignment of errors | 73 | 20 |
| Bill of exceptions | 75 | 20 |
| Writ of error | 80 | 21 |
| Supersedeas-bond | 82 | 22 |
| Original citation | 85 | 23 |
| Certificate of clerk | 86 | 24 |

1 United States circuit court, district of Iowa.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE AND ST. PAUL RAILWAY Company. } At law. Transcript.

2 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Monday of May, it being of the 11th day of May, A. D. 1874, before the Hon. Samuel F. Miller, associate justice.

3 Be it remembered that heretofore, to wit, on the 12th day of March, A. D. 1872, the Milwaukee & St. Paul Railway Company, by its attorney, Thos. Updegraff, esq., filed in the office of the clerk of the United States circuit court for the district of Iowa a transcript from the circuit court of Clayton County, Iowa, wherein Timothy Kellog was plaintiff, and the Milwaukee & St. Paul Railway Company was defendant, which said transcript is in words and figures following, to wit:

4 Circuit court, January term, 1872.

STATE OF IOWA, *Clayton County:*

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL RAILWAY COMPANY. } Petition. At law.

Your petitioner, Timothy Kellogg, claims of the defendant, the Milwaukee and St. Paul Railway Company, which is a corporation operating a line of railway in Clayton County, the sum of twenty thousand dollars, which he alleges to be due him from said defendant.

And for cause of such claim states that heretofore, to wit, on the 3d day of October, A. D. 1871, at the county aforesaid, he, the said plaintiff, was the owner and in possession of a certain steam saw-mill of the value of ten thousand dollars, situated on the bank of the Mis-
5 sissippi River, on lots thirty-three and thirty-four in Giard Land Company's river addition to McGregor, in said county, which mill was then and there used, occupied, and operated by your petitioner in the manufacture of lumber, pumps, lath, shingles, doors, sash, shutters, and other articles made and manufactured out of wood, and on the day and year last aforesaid he had upon said premises and in and about said mill and adjacent lots four hundred thousand feet of pine lumber, of the value of six thousand four hundred dollars; five hundred and twenty-five pump-heads, of the value of seven hundred and eighty-seven dollars and fifty cents; three hundred and fifty cords of wood-filling, of the value of seven hundred dollars; one patent-augur and pump-tools, of the value of five hundred dollars; one shingle-mill, of the value of one hundred and fifty dollars; one Sticher eight-inch knife, and two
6 leithes, of the value of three hundred dollars; one thousand feet of pump-pipe, of the value of one hundred and fifty dollars; three hundred pump-cylinders, of the value of seventy-five dollars, amounting to the value of nine thousand sixty-two dollars and fifty cents, and including the value of said mill with its fixtures to the total value of nineteen thousand and sixty-two dollars and fifty cents.

And your petitioner further states that the said defendants were, at the time and place aforesaid, the owners and in possession of a large grain-elevator building, built of wood, situated on the banks of the said river, adjacent to the said saw-mill, and on lots 46, 47, & 48 in said Giard Land Company's river addition to McGregor, in said county, and which elevator was at the time and place aforesaid used, operated, and controlled by said defendants, their agents and employees, for the purpose of elevating and discharging grain or wheat.

7 And your petitioner further states that, in order to facilitate the discharge of grain or wheat therefrom into barges and bins erected on sleighs, there was cut through the river side of said elevator five or six openings one foot square in addition to five or six permanent spouts of the same dimention protruding from the same side of the same and communicating with the interior of said building, together with a large number of windows on different sides thereof, all of which openings, spouts, and windows were on the day and year last aforesaid carelessly and negligently left open by the said defendants, their agents and employees, without leaving any one in said building or elevator to take care and charge of the same.

And your petitioner further states that at the time and place last aforesaid the said defendants were also the owners, proprietors, and in possession of a certain steamboat moved and propelled by steam,

8 called the Jennie Brown, which used, consumed, and burned wood in her furnace for the purpose of heating her boilers, and which boat was at the time and place aforesaid used, operated, employed, and controlled by said defendants, their agents and employees, in and about the business of the said defendants in carrying goods, wares, merchandise, as well as towing boats or barges containing railroad-cars, on the Mississippi River from Prairie du Chien, in the State of Wisconsin, to North McGregor, in the State of Iowa, in connection with and for the use and benefit of defendant's line of railway as aforesaid.

And your petitioner states that the said steamboat and the machinery which propelled the same was at the time and place aforesaid, and while used and operated and controlled by said defendants, their agents and employees, so constructed and arranged as to discharge her wasted, escaped, or exhausted steam into the smoke stacks or pipes of

9 said steamer, by reason of which the draft from the furnaces up through and out of said smoke stacks or pipes was greatly increased, causing the same to emit and discharge large quantities of sparks and coals of fire whenever the machinery of said boat was in operation; thereby rendering and making said steamboat exceedingly dangerous and liable to communicate fire to wooden buildings, structures, or other inflam'able materials erected along the banks or shore of said river whenever said steamboat came near, adjacent, or in contact with said structure.

And your petitioner states that the said defendants, on the day and year last aforesaid, and while using, operating, and controlling said steamer as aforesaid, carelessly and negligently omitted to provide the necessary, safe, and proper screens or spark catchers or arresters on the smoke stacks or pipes of said steamers in order to prevent

10 the said sparks and coals from doing damage and injury to property along the shore or banks of said river as aforesaid.

And your petitioner further states that on the day and year last aforesaid, and while said steamboat was making one of her trips as aforesaid, for the purposes aforesaid, and while under the management and control of the said defendants, their agents and employees, as aforesaid,

they, the said defendants, carelessly and negligently allowed and permitted the said steamboat to approach and lie alongside, or in close proximity, to the said grain-elevator, and then and there carelessly and negligently allowed, permitted, and caused large and strong drafts of escaped or exhausted steam to pass and rush into the smoke stacks or pipes of the said steamboats, whereby and by reason of which drafts or rush of steam therein large quantities of cinders, sparks, or coals
11 of fire were emitted, discharged, driven, and forced up through and out of said smoke stacks or pipes, against the sides and walls and opposite the spouts, openings, windows, and doors of said elevator as aforesaid, from which cinders, sparks, & coals of fire the said elevator, by reason of and in consequence of the carelessness and negligence of said defendants, their agents and employees, in not providing the proper and necessary screens or spark-arresters upon said smoke stacks or pipes, as aforesaid, and by reason and in consequence of the negligence and carelessness of said defendants, their agents and their employees, in not keeping some person in charge of the same, by reason of and in consequence of the negligence and carelessness of said defendants, their agents, and employees, in not keeping the said permanent spouts, openings, windows, and doors of said elevator closed or shut, the said elevator caught or took fire, creating large sheets
12 of flame, from which flame coals of fire, sparks, and burning cinders were thrown, driven, and passed to the said mill of your petitioner as well as the other property above mentioned, causing the said mill and other property to take fire and burn, and which mill, together with the other property, was, by reason and in consequence of the negligence, carelessness, acts, and omissions of the said defendants, their agents and employees, as before stated, on the day and year last aforesaid, entirely consumed and burned from said coals of fire, flame, and burning cinders. Wherefore, and by reason and in consequence of the said negligence, carelessness, acts, and omissions of said defendants, their agents and employees, as before stated, the plaintiff has sustained damage in the sum of twenty thousand dollars.

He therefore asks judgment for that amount, with interest and costs of suit.

SAMUEL MURDOCK,
*Attorney for Plaintiff.*

13 The defendant will also take notice that the following is a list of the items destroyed and consumed by said fire, with their value, and of which evidence will be given on the trial of the said cause, to wit:

| | | |
|---|---|---|
| One steam saw-mill & fixtures | $10,000 | |
| 400 thousand feet of pine lumber | 6,400 | |
| 525 pump-heads | 787 | 50 |
| 350 cords of filling | 700 | |
| Patent auger & pump-tools | 500 | |
| One shingle-mill | 150 | |
| One 8-inch sticher & 2 lathes | 300 | |
| 1,000 feet of pump-pipe | 150 | |
| 300 pump-cylinders | 75 | |
| Total value | $19,062 | 50 |

SAMUEL MURDOCK,
*Attorney for Plaintiff.*

On the back was the following indorsement: Timothy Kellog ag'st Mil. & St. Paul Railway Co. Petition, at law. Clayton County circuit court. Filed January 18th, 1872. L. A. Mahoney, dep'y clerk C. C. John T. Stoneman and Samuel Murdock, attys.

14 In the circuit court.

*Original notice.*

STATE OF IOWA, *Clayton County :*

TIMOTHY KELLOG
*vs.*
M. AND ST. P. RY. CO.

To the Milwaukee and St. Paul Railway Company, defendant :

You are hereby notified that on or before the 18th day of January, 1872, a petition will be filed by said plaintiff, Timothy Kellog, in the office of the clerk of the circuit court of said Clayton County, Iowa, claiming of you twenty thousand dollars as damages, caused by your negligently & carelessly setting fire to his mill, lumber, pumps, shingle-machine, filling, pipe, pumps, cylinders, and other property mentioned in accompanying petition.

And that unless you appear thereto and defend before noon of the second day of the next term of said court, commencing on the 29
15 day of January, 1872, default will be entered against you and judgment rendered thereon.

Dated this 21st day of December, 1871.

TIMOTHY KELLOG, *Plaintiff.*
*Attorney.*

On the back of said notice was the following endorsement, to wit :

I hereby certify that this notice came into my hands for service on the 9th day of January, A. D. 1872, and I did on the same day serve the same on the within-named Milwaukee and St. Paul Railway Company by delivering to P. E. Wilson, agent of said railway company, in Mendon Township, Clayton County, Iowa, a true copy of the within notice and petition annexed thereto, he having waived the reading of the same.

JAMES DAVIS, *Sheriff,*
By E. DOUGLASS, *Deputy.*

Fees, $2.80.

16 In the circuit court of Iowa in and for Clayton County.

*Petition for removal.*

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL RAILWAY COMPANY.

To the circuit court aforesaid :

Your petitioner, the Milwaukee & St. Paul Railway Company, respectfully states to the court the above-entitled action has been commenced and is now pending in the circuit court aforesaid, by Timothy Kellog, as plaintiff, against your petitioner; that said plaintiff is a citizen of

the State of Iowa; that your petitioner, the Milwaukee & St. Paul Railway Company, is a citizen of the State of Wisconsin, incorporated under the laws of that State by that name, and having its principal place of business in said State of Wisconsin; that the matters in dispute in said action exceed the sum of five hundred dollars exclusive of costs, the damages claimed by said plaintiff being laid in his petition
17 herein at twenty thousand dollars; that special bail was not originally required in said action. Your petitioner therefore asks for the removal of said cause for trial into the next circuit court for the United States to be held in the district of Iowa, and it now offers good and sufficient security for its compliance with the law in relation to entering in such court copies, &c.

NOBLE, HABET & FRESE, &
T. UPDEGRAFF,
*Attys. for Deft.*

I, Thomas Updegraff, do solemnly swear that I am one of the attorneys for defendant in the foregoing case; that I am acquainted with the statements in the foregoing petition, and that the same are true, as I verily believe.

THOS. UPDEGRAFF.

Sworn to and subscribed before me by Thos. Updegraff this 24th day of January, 1872, in my presence.

[SEAL.] M. E. DUFF,
*Notary Public.*

18 Endorsed on back was the following: Timothy Kellogg vs. The Mil. & St. Paul Rail W. Co. Petition for removal. Filed January 30th, 1872. L. A. Mahoney, dep'y clerk C. C.

19 In the circuit court of Iowa in and for Clayton County.

TIMOTHY KELLOG
*vs.*
THE MIL. & ST. P. R. W. Co. } Bond.

Comes now the Milwaukee and St. Paul Railway Company as principal, and as surety, and acknowledge themselves to owe and be indebted to the said plaintiff, Timothy Kellogg, in the sum of five thousand dollars, for the payment of which we bind ourselves, our heirs, and representations upon this condition, however—

That whereas the said Milwaukee and St. Paul Railway Company has filed its petition in said court asking the removal of said cause for trial to the next circuit court of the United States for the district of Iowa:

Now, therefore, if said petition shall be granted and said Milwaukee & St. Paul Railway Company shall enter into said circuit court on the first day of its session copies of all process, pleadings, depositions,
20 testimony, and other proceedings, this bond to be void; otherwise of force.

THE MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Per T. UPDEGRAFF, *Att'y.*
GREGOR McGREGOR.

Dated Jan'y 24, 1872.

On the back was the followlng endorsement: Timothy Kellogg vs. The Mil. & St. *R.* R. W. Co. Bond. Filed and approved January 30, 1872. L. A. Mahony, dep'y clerk C. C.

21 *Record entry.*

TIMOTHY KELLOGG
*vs.*
THE MIL. & ST. PAUL RAILWAY COMPANY. } 501. Pet.

And now on this day, to wit, January 31, 1872, came the plaintiff, by Stoneman and Murdock, his atty's, and the defendant, by T. Updegraff and Noble, Hatch and Frese, his atty's, and the defendant filed his petition and bond for removal of this cause to the next circuit court of the United States; and the cause being submitted to the court, and after argument of counsel, and the court being fully advised, it is hereby ordered that this cause be removed to the circuit court of the United States for the district of Iowa.

22 STATE OF IOWA,
*Clayton County, ss:*

I, H. S. Granger, clerk of the circuit court of Iowa, in and for Clayton County, do hereby certify that the foregoing is a true and compared transcript of all process, pleadings, testimony, and other proceedings in the foregoing-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Elkader, in said county, on this 26th day of Feb'y, 1872.

(Signed) H. S. GRANGER, *Clerk C. C.*,
[SEAL.] By L. A. MAHONY, *Dep'y.*

[U. S. int. rev. 5 cents. H. S. G. Feb'y 26, 1872.]

(Endorsed:) Filed M'ch 12, '72. George B. Corkhill, clerk.

23 Afterwards, to wit, on the 23d day of May, 1872, the same being of the May term, 1872, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1872, Thursday, May 23d, 1872.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL R. R. CO. } No. 1192. Law.

This cause coming on for hearing, the same is continued and specially set down for hearing on the first Thursday of the next term of this court.

24 Afterwards, to wit, on the 19th day of October, 1872, said defendant, by its att'y, Thos. Updegraff, filed in said clerk's office an affidavit for continuance in said cause, which said affidavit is in words and figures following, to wit:

In the circuit court of the United States for district of Iowa.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL RAILWAY CO.

Jno. W. Cary and Thos. Updegraff do solemnly swear that Joseph Reynolds, who resides at McGregor, Iowa, Scott, who resides at Dubuque, Iowa, or Fulton, Illinois, and W. F. Danelson, of Saint Louis, Missouri, are material witnesses for the defendant in the above-entitled cause. That we expect to prove by said witnesses that the use of spark-arresters on or in the smoke-stacks on Mississippi River steamers is impracticable; that these witnesses are owners of or concerned with nearly all the steamers navigating the said river above Saint
25 Louis, and are men of great experience and skill in engineering and steamboating; that they have on the boat-lines with which they are connected endeavored to use spark-arresters of different kinds in smoke-stacks, and have been compelled to remove them and abandon their use by reason of the practical difficulties which their presence on or in steamboat smoke-stacks heated; that scarcely any boat on the said river now use said devices; that these facts we believe to be true, and we know of no other witnesses by whom the same can be so fully proved; that these facts, and that the said witnesses would testify to them, were unknown to defendant or its counsel until the 18th day of October, 1872; that H. C. Hayt and Oscar Burdick, residents of Chicago, Illinois, are also material witnesses for defendant; that we expect to prove by said Hayt & Burdick that they were, before the destruction of plaintiff's property, familiar with it or its value, and that the total value thereof at the time of its destruction did not ex-
26 ceed twelve thousand dollars; that these witnesses were acquainted with both the value of this class of property; that we believe these facts to be true, and that we know of no other witnesses by whom these facts can be so fully proved; that neither the defendant or its counsel had knowledge that these facts could be proved by these witnesses until Oct. 18, 1872; that affiants are defendant's attorneys; that knowing the places of residence and the names of said witnesses, there is no reasonable doubt that defendant can obtain their testimony by deposition for the next term of this court.

(Signed) JNO. W. CARY.
THOS. UPDEGRAFF.

Sworn to and subscribed before me this 19th day of October, 1872, in my presence, by Jno. W. Cary & T. Updegraff.

(S'g'd.) GEORGE B. CORKHILL, *Clerk.*

(Endorsed:) Filed Oct. 19, 1872. George B. Corkhill, clerk.

27 On the 7th day of Nov., 1872, there was filed in said clerk's office, in said cause, the following objections to the affidavit for continuance, to wit:

28 United States circuit court, district of Iowa.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL RAILWAY CO.
} Objections to defendant's affidavit.

The plff., by his attys., objects to the affidavit of defend't's attys. for a continuance of said case because the same does not state facts sufficient, in that—

1. It shows no diligence. It states no efforts or facts constituting diligence to obtain the witnesses named in their affidavit, nor to obtain the evidence which it is stated in said affidavit is expected to be shown by said witnesses.

2. There is no diligence or efforts stated or shown that defend't
29 or its attys. or agents have made any efforts to procure such evidence that the continuance is asked for the purpose of obtaining.

3. The affidavit shows negligence of deft.

(Signed) MURDOCK & STONEMAN &
M. H. BEACH,
*Plff.'s Attys.*

(Endorsed:) Filed Nov. 7, 1872. George B. Corkhill, clerk.

30 On the 19th day of October, the same being of the October term, 1872, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

Circuit court of the United States, district of Iowa, October term, 1872. Saturday, Oct. 19, 1872.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL R. R. Co. } No. 1192. Law.

This cause coming on this day for hearing upon deft.'s motion for a continuance, plff. appears, by Murdock & Beach, and deft. by Carey & Updegraff, and the court being advised in the matter orders that this cause be continued at defendant's costs, and by consent of parties the cause is set down by the court for hearing on the 1st Wednesday of next term of this court.

31 Afterwards, to wit, on the 15th day of May, 1873, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1873. Thursday, May 15, 1873.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL R'Y CO. } No. 1192. Law.

This cause came on this day to be tried. The plaintiff appeared by S. Murdock & M. H. Beach, and defendant by Cary and Tho. Updegraff; and then came a jury of twelve good and lawful men, to wit, Geo. Kennedy, H. C. Gill, H. H. Smith, W. H. Penn, D. G. McCloud, Wm. Tucker, W. E. Webster, J. L. Roberts, J. L. McAuley, H. C. Clock, C. White, Luke Palmer, who were duly empannelled and sworn to well and truly try this cause and the issues joined, and a true verdict render according to the law and evidence given them in court. And
32 after hearing the statement of the case from counsel and a part of the evidence, they were excused until 9 o'clock to-morrow morning.

33 And afterwards, to wit, on the 16th day of May, 1873, the sams being of the May term of said court, there appears in the recorde of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1873. Friday, May 16, 1873.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE AND ST. PAUL RAILROAD Company. } No. 1192. Law.

This cause came on this day for further hearing. Parties appear by their attorneys, and the jury came the same as yesterday; and they, after hearing balance of the evidence and a part of arguments of counsel, were excused until to-morrow morning at o'clock.

34 Afterwards, to wit, on the 17th day of May, 1873, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1873. Saturday morning, May 17, 1873.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL R'Y CO. } No. 1192. Law.

This day this cause came on to be further heard. Parties appear by their attorneys, and the jury came the same as yesterday; and they having heard arguments of counsel and charge of court, retired to a private room, under charge of a sworn officer, to consider their verdict, and after a long time spent in deliberation thereon they return into open court and state that they are unable to agree upon a verdict; and thereupon the court ordered that they be discharged from any further consideration of this case, and that this cause stand continued.

35 On the 19th day of May, 1873, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1873. Monday, May 19, 1873.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL R'Y CO. } No. 1192. Law.

This day this cause came on for hearing. Plff. is given leave to amend his petition in sixty days from this date, copy of same to be served on defendant's attys.; and the cause is set specially for trial on the 1st Wednesday of the next term of this court.

36 Afterwards, to wit, on the 18th day of July, 1873, said plff., by his said attorneys, filed in said clerk's office his amended petition, which said amended petition is in words and figures following, to wit:

37 United States of America, district of Iowa. Circuit court.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL RAILWAY CO. } Amended petition.

The plaintiff in the above-entitled action, Timothy Kellog, in this his amended petition, leave having first been granted by the court to file

the same, complaining of defendant, the Milwaukee and St. Paul Railway Company, states—

1. That the said defend't, the Milwaukee and St. Paul Railroad Co., is a corporation under the laws of the State of Wisconsin, and is operating a line of railroad in the State of Iowa, from the town of North McGregor, on the Mississippi River, in a westerly direction through the county of Clayton & other counties west thereof in said State of Iowa.

2. That on the 3rd day of October, 1871, & prior thereto, the plaintiff was the owner and in possession of the following-described prem-
38 ises, to wit: Lots numbered thirty-one (31) to forty, both inclusive, in the Giard Lan' Company's river addition to the town of McGregor, in the county of Clayton, State of Iowa.

That on the date last aforesaid he was the owner, in possession of, and operating and running a certain steam saw-mill, and pump-factory connected therewith, together with a lumber-yard, containing large quantities of lumber, all situated on said premises.

That said saw-mill was on said date, & prior thereto had been, possessed, occupied, used, & operated by plaintiff in the manufacture of lumber, dimension-stuff, lumber & timber, shingles, lath, & other articles manufactured out of wood; and the pump-factory in the manufacture of pumps & pump material.

That said saw-mill, & the machinery connected therewith for sawing purposes, were at the date aforesaid of the value of ten thousand dollars, ($10,000.) That there were in said mill or pump-factory one patent augur, and other tools used in the manufacture of pumps, of the value of five hundred dollars, ($500;) one eight (8) inch sticker and two
39 (2) lathes, of the value of three hundred dollars, ($300.00;) and one (1) shingle-machine of the value of one hundred and fifty dollars, ($150.00.)

That there were stored on said premises, in the lumber-yard & in & around the mill, at the date aforesaid, & round & possessed by the plaintiff, four hundred thousand (400,000) feet of pine lumber, of the value of six thousand four hundred dollars, ($6,400.00;) five hundred and thirty-five (535) pump-heads, of the value of seven hundred & eighty-seven dollars & fifty cents, ($787.50;) three hundred pump-cylinders, of the value of seventy-five dollars, ($75;) one thousand (1,000) feet of pump-pipe, of the value of one hundred & fifty dollars, ($150;) and seven hundred and sixty-five (765) cords of slab-filling, of the value of one thousand five hundred and thirty ($1,530) dollars; amounting in the aggregate to the sum and value of nineteen thousand eight hun-
40 dred and ninety-two $\frac{50}{100}$ ($19,892.50) dollars, as will appear from the bill of particulars hereto attached, marked "Exhibit A."

3. That the defendants were, on the day & year last aforesaid, the owners and in possession & control of a certain grain-elevator situated on lots numbered forty-six, (46,) forty-seven, (47,) & forty-eight, (48,) in said Giard Land Co.'s river addition to the town of McGregor. That said elevator was constructed of pine lumber & not sheeted with iron, brick, or any material to protect the same from fire or ignition by sparks or coals of fire or burning timbers thrown out from the smoke-stacks of steamboats or locomotives; that said elevator was used by said defend'ts for receiving, storing, & discharging wheat, oats, corn, & other grains, and that in order to facilitate the discharge of such grains into boats or barges, there were cut through the river side of said elevator five (5) or six (6) openings or holes of the dimension of fifteen (15) or eighteen (18) inches in addition to about the same num-
41 ber of permanent spouts protruding from the same side of said

elevator; that there were also a large number of windows & doors on different sides of said elevator; that on the day & year aforesaid the said spouts, holes, or openings cut through said elevator as aforesaid, were carelessly & negligently left open by the said defend'ts, their agents, servants, & employees, and that no means were nor had been provided for closing the same; that said elevator was sixty feet (60) long, fifty (50) feet wide, and one hundred and twenty feet (120) high, & that it was not only very & unusually combustible & inflam'able from the character of the materials of which it was built, and from its manner of construction, but that the dust occasioned & arising from the moving, elevating, & discharging grain therein & therefrom, accumulating in great quantities, both inside & outside thereof, from its dryness & inflam'ability, increased greatly the danger of its ignition from sparks, coals of fire or burning cinders; that said elevator was
42 situated on a navigable channel of the Mississippi River, &, from the objects of its construction & the business carried on in it, was liable at all times during the season of navigation on said river to be approached by steamboats burning wood in their furnaces for the purpose of generating steam, and which boats while working or operating their machinery are constantly emitting & throwing out from their smoke-stacks burning cinders, sparks, & coals of fire, rendering them exceedingly dangerous whenever they approach or come in contact with wooden structures constructed in the manner & form of said elevator, and consequently demanding greater care, caution, skill, & watchfulness, both on the part of owners, officers, agents, servants, & employees having the charge & control of both steamboats & elevators, under such circumstances, to prevent the escape of fire & the destruction of property; that on the day and year aforesaid the said defend'ts, their agents, servants, & employees, carelessly & negligently left the said spouts, openings, holes, & windows in said elevator open, &
43 carelessly & negligently omitted then & there to provide watchmen, guards, or proper persons to take care of the said elevator in order to prevent sparks, coals of fire, or burning cinders emitted or thrown out of the smoke-stacks of steamboats as aforesaid from igniting the same, through or in said cracks, openings, holes, windows, & spouts, so left open as aforesaid, & to extinguish the fire if ignited.

4. That at the time aforesaid the said defend'ts were the owners & in possession & control of a certain steamboat, called the Jennie Brown, moved & propelled by steam, & which used & consumed wood as a fuel in her furnaces for the purpose of generating steam; that said steamboat was used by said defend'ts, their agents, servants, & employees, in & about the business of the said defend'ts, in carrying goods, wares, & merchandise, & in towing boats, or barges, loaded with railroad-cars, from Prairie du Chien, in the State of Wisconsin, across said river, to North McGregor, in the State of Iowa, in connection with & for the use & benefit of defend'ts' line of railroad, operated by defend't as afore-
44 said. The said steamboat, & the machinery by which the same was propelled, was at the time and place aforesaid, & while used & operated & controlled by defend'ts as aforesaid, & arranged as to discharge the exhausted steam into the smoke-stacks or pipes, for the purpose of increasing by reason thereof the draft from the furnaces up through & out of said smoke-stacks, causing the throwing out & discharge of large quantities of sparks, coals of fire, & burning cinders whenever the machinery of said boat was in operation, thereby rendering & making said boat exceedingly dangerous & liable to communicate fire to wooden structures or buildings, or other combustible or inflam'able

matter on or along the banks of said river whenever the said steamboat approached thereto or came in contact therewith. That said steamboat was more than ordinarily dangerous by reason of the peculiar character & construction of her machinery, thereby causing her when her machinery was in operation, & when wood was used to generate steam, to throw out of her smoke-stacks unusually large quantities of
45 coals of fire & sparks, & on that account & for that reason, requiring & demanding great & more than ordinary or usual skill, caution, & watchfulness in navigating her. That said defend'ts, their agents, officers, servants, & employees, did not navigate said steamboat on the date & at the place aforesaid with skill, caution, and watchfulness, but carelessly & negligently, & through the careless, negligent, & unskillful & improper management of said steamboat by said defend'ts, their officers, agents, servants, & employees, large quantities of sparks, coals of fire, & burning cinders were thrown out of said smoke-stacks, by reason thereof plaintiff's saw-mill, lumber, & other property were consumed, by means whereof plaintiff lost his said property.

5. That on the day & year aforesaid the said defend'ts, their officers, agents, servants, & employees, while using, operating, & controlling the said steamboat as aforesaid, carelessly & negligently omitted & neglected to provide & attach the necessary & proper screens, spark-
46 arresters, or spark-catchers to the smoke-stacks thereof, in order to prevent the said sparks or coals of fire from escaping & doing damage & injury by setting fire to wooden structures & combustible matter along the banks of said river, and that by reason of such carelessness was set on fire and consumed, to his injury and damage in, to wit, the aggregate value thereof, as above shown.

6. That said defend'ts on the day and year aforesaid were unlawfully and illegally running, using, operating, and navigating said steamboat, in that they did not comply with or observe the provisions and requirements of the laws of the United States vessels as to the employment on said steamboat of licensed captain and mate. That on said date the said defend'ts did not employ nor have in their services on said boat either a licensed captain or chief mate, nor had they at any time prior thereto employed such officers on said boat, nor either of them, nor did they at said date, nor at any other time, employ on said boat a
47 person with license of pilot & captain or mate, as provided in said laws. That there was no excuse, nor good nor valid reason, for not complying with & observing said laws in the employment of licensed captain & chief mate, nor for not temporarily supplying the deficiency by the employment of other persons until said licensed officers of said class could be & were obtained. That by reason of there being no licensed captain or mate employed by defend'ts on said boat, nor persons temporarily employed to supply the deficiency of said officers, as provided, directed, & required by the said laws of Congress, she was negligently, carelessly, unskillfully, & improperly navigated, managed, & directed; and that by reason of such illegal, unlawful, unskillful, negligent, & careless navigation & management & operation of said boat as aforesaid the plff.'s property was set on fire & consumed as aforesaid.

48 That said defend'ts were on the day & year aforesaid, & while using, operating, & controlling said steamboat as aforesaid, guilty of great wrong, negligence, & carelessness in employing one Henry Gilpatrick as pilot thereon. That on said date, & while using & navigating said boat as aforesaid, the said Gilpatrick, who was acting as pilot thereof as aforesaid, was wholly unfit to discharge the duties of

pilot by reason of his want of the necessary skill & knowledge & by reason of his intemperate habits.

8. That the said defend'ts were on the day & year aforesaid, & at the place aforesaid, & while using & navigating said steamboat as aforesaid, guilty of gross wrong, negligence, & carelessness, in employing & permitting to act & serve on said boat one Richard Welch as engineer thereon. That said Welch was so acting, he was totally unfit & unqualified to discharge the duties of engineer by reason of his want of the necessary skill & knowledge, & also by reason of his intemperate habits.

49 9. That on the day & year aforesaid the said elevator, as well as the property of plff. above described, & everything on & along the banks of the said river at & near said North McGregor, was extensively combustible & inflam'able by reason of an extreme drought which prevailed at that place & at that time, & had prevailed for some time prior thereto, whereby the said elevator, as well as the property of plff. aforesaid, were rendered & made & had become & were unusually & extremely dry, inflam'able & liable to ignition, & demanding more than ordinary care & caution on the part of those in charge of & controlling & operating steamboats, in approaching, coming in contact with, or in the vicinity of the elevator & property aforesaid, as is usual & customary to be observed in such cases, and also demanding more than ordinary watchfullness & care on the part of those operating, controlling, using, & in charge of elevator constructed of the material & in the manner & form of said elevator, & as is also usual & customary to be observed *to be observed* in such cases & under such circumstances.

50 That said defend's, their officers, agents, servants, & employees, were guilty of carelessness & negligence in failing & neglecting to observe in any manner or to any degree such caution, care, skill, prudence, & watchfulness in reference to either said steamboat or said elevator & other property.

10. That on the day and year aforesaid, & while the defend'ts, their agents, servants, & employees, were using, operating, & controlling said steamboat as aforesaid, a very high wind, amounting to a gale, was blowing at said North McGregor in the direction from said elevator to & towards the property of plff. above described. That said gale of wind rendered the running, operation, & navigation of steamboats engaged & employed as the Jennie Brown was on that day & at that place imprudent, unsafe, & dangerous, because, first, of the difficulty in managing, navigating, & directing the boat, & second, of the *of the* danger & liability of wooden buildings & structures & combustible

51 & inflam'able matter on & along the banks of said river being set on fire by sparks & coals of fire from the chimneys of said boats. And that skillful & prudent men acquainted with the management & navigation of steamboats would not have run nor operated a steamboat on said day during the prevalence of said gale at said place on such business as the said Jennie Brown was engaged in on said day. That said defend'ts, their officers, agents, servants, & employees, negligently, carelessly, & imprudently run & operated said boat on said day at said place, & during the prevalence of said gale of wind, in the business of towing and transferring barges loaded with railroad-cars as aforesaid, and that they negligently, carelessly, needlessly, & imprudently run & directed said steamboat to the said elevator & to come in contact with & lie close alongside thereof on said day, & in said gales, & caused him to move about in the vicinity thereof, and that they did then & in said gale cause the machinery of said boat to work & oper-

ate near, close by, & opposite to the walls, sides, & ends of said
52 elevator, & the cracks, holes, & openings therein & spouts & windows thereof, & carelessly & negligently caused large & strong drafts of exhaust steam to pass & rush into the chimneys or smoke-stacks of the said boat; and that by reason of the said careless, negligent, & imprudent working of the said machinery, & the rush & escape of the exhaust-steam, large quantities of burning cinders, sparks, & coals of fire were emitted, discharged, driven, & forced up, through, & out of said chimneys or smoke-stacks, & were driven & forced by said wind against the sides, ends, & on the roof & opposite to & into the cracks, openings, holes, & spouts of the said elevators, & from which burning cinders, sparks, & coals of fire the said elevator was set on fire, creating a large & extensive flame, which, with large quantities of burning cinders, sparks, & coals of fire from said burning elevator was driven & blown by said wind among & into the piles of lumber
53 & into, about, & through the mill & other property of the plff. above described, by reason whereof the said lumber-mill & other property of plff. aforesaid took fire & were consumed.

11. That on the day & year aforesaid, & at the place aforesaid, the said defendt's, their agents, servants, & employees, in making a trip with said steamboat from Prairie du Chien, in the State of Wisconsin, to North McGregor, in the State of Iowa, with two barges loaded with railroad-cars, & while a gale of wind was blowing at said place, negligently, carelessly, & needlessly approached, & for a considerable time lay close alongside, the elevator above described, being under a pressure of steam created by kindling and continuing the fires & heating the boilers of said steamboat; & also negligently, carelessly, & imprudently operated & worked the machinery of said boat to its utmost capacity & power, increasing the fires in the furnaces, escaping & discharging the exhaust steam into the smoke-pipes or chimneys for
54 the purpose of increasing the draft of said furnaces & intensifying the heat, for the purpose of generating more steam, and also with said wind blowing into the furnaces, increasing said draft, fire, & heat, so unskillfully, carelessly, & negligently conducted & managed the said fires on board said steamboat, in said wind and alongside said elevator, in the dry & inflammable condition of the character aforesaid, that a large quantity of fire & sparks & coals of the said fires, ascending & coming & driven & forced up through & out of said chimneys or smoke-pipes, through the careless, negligent, improper, & unskillful management, conducting & directing of the said fires on board the said steamboat by the defendts' & their officers, servants, & employees on board thereof, were driven cast, blown & lodged in & upon the said elevator, its sides, & the openings & holes therein & spouts protruding therefrom, by reason whereof the said elevator was set on fire & burned, causing, from the character & dry condition thereof, & the force of said winds, an extensive flame & intense heat, & from the form & direction of said wind at said place necessarily & inevitably set fire to the
55 lumber, saw-mill, & other property of said plff. above described, & the same were entirely & wholly consumed, burned, & destroyed, & whereby plff. suffered loss & damage & injury in, to wit, the value thereof as above shown.

12. And for a further cause of action plff. states that during the whole or greater part of the 3d October, 1871, the wind was blowing unusually hard & strong, increasing at times to the fierceness of a gale. And on said day the defts. were the owners & proprietors, using & operating by their agents, servants, & employees, a certain other steamboat called the

Jennie Brown, moved & propelled by steam, & which, on said day, used and consumed wood in her furnaces for the purpose of heating her boilers, and which said steamboat was on the day and year aforesaid used and engaged by said defendants, their agents, and employees, in carrying goods, wares, merchandise, and in towing boats and
56 barges in connection with defendants' line of railway in said county from Prairie du Chien, in the State of Wisconsin, to North McGregor, in the State of Iowa.

And on the day and year last aforesaid, and while operated, used, and controlled by said defendants, their agents, and employees, and while the said wind was blowing a gale from the said steamboat towards and in the direction of the elevator above described, the said defendants, their agents, and employees, carelessly, negligently, and without the exercise of proper and prudent caution, allowed, permitted, and counsel' said steamboat to approach and lie alongside of, or in close proximity to, the said elevator, and while in such close proximity, and during the prevalence of said strong wind, did then and there, carelessly and negligently, without the exercise of prudent caution, cause the engine and machinery of the said steamboat to work and operate, whereby and by reason of the working and operation of said machinery
57 large quantities of burning cinders, sparks, and coals of fire were emitted, discharged, and forced up and out of the smoke-stacks of the said steamboat, and which sparks, coals of fire, and burning cinders were forced and driven by said violent wind from the said smoke-stacks against the sides, walls, ends, and opposite the cracks, openings, and spouts of the said elevator, and from which burning cinders, coals of fire, and sparks, the said elevator, on the day and year aforesaid, became ignited, creating a large and extensive flame, which, together with large quantities of coals of fire and burning cinders, were driven by said violent wind from the burning elevator in, upon, and around the saw-mill and other property of said plaintiff above described, causing the said mill and other property to become ignited and take fire, & to be entirely consumed.

And plaintiff further states that by reason and in consequence of all and singular of the said several acts, omissions, carelessness, negligence, and want of prudence, care, and caution herein alleged, charged,
58 and stated against defendants, their agents, servants, and employees, in the construction, operation, control, management, use, and business of said steamboats and her machinery, and in the management, charge, and control of said elevator, whereby and by reason of which the said elevator was ignited and set on fire, his said saw-mill, together with the other property above enumerated and described, was on the day and year last aforesaid wholly, totally, and entirely burned, consumed, and destroyed from the flames, sparks, coals of fire, and burning cinders issuing, driven, and forced against said mill and other property from said burning elevator.

And he further states that by reason and in consequence of said several acts, omissions, carelessness, negligence of proper care and prudence on the part of said defendants, their agents, servants, and employees, he has sustained damages in the sum of nineteen thousand eight hundred and ninety-two dollars & $\frac{50}{100}$. He therefore asks judgment for the said amount with interest and costs of suit.

(Signed) SAMUEL MURDOCK,
JOHN STONEMAN,
MYRON BEACH,
*Attorneys for Plaintiff.*

59 The defendant will also take notice that the following is a bill of items of the property consumed and destroyed as above stated, with the value attached, and of which evidence will be given on the trial of said cause.

(A.)

| | |
|---|---|
| Saw-mill and machinery | $10,000 |
| 400,000 feet of pine lumber | 6,400 |
| One patent augur & pump-tools | 500 |
| One 8-inch sticker & 2 lathes | 300 |
| One shingle-machine | 150 |
| 535 pump-heads | 787 50 |
| 300 pump-cylenders | 75 00 |
| 1,000 feet of pump-pipe | 150 00 |
| 765 cords of slat-filling | 1,530 00 |
| | $19,872 50 |

(S'g'd) MURDOCK, STONEMAN & MYRON H. BEACH,
*Attorneys for Plaintiff.*

(Endorsed:) Filed July 18, 1873. George B. Corkhill, clerk.

60 Afterwards, to wit, on the 10th day of October, 1873, there was filed in said clerk's office a stipulation of parties in said cause; which said stipulation is in words and figures following, to wit:

In the circuit court of the United States in and for the district of Iowa.

TIMOTHY KELLOG
*vs.*
THE MILWAUKEE & SAINT PAUL RAILWAY Company. } Stipulation.

It is hereby stipulated by the respective parties to above suit—

1st. That plaintiff's amended petition now filed in clerk's office shall be considered and treated as having been filed on the 18th day of July, 1873, in all respects.

2nd. At the October term, 1873, of said court said cause shall be continued generally until the next term after said October term of said court.

3rd. Said defendant shall answer said plaintiff's said amended
61 petition on or before Nov. 15, 1873, and mail copy of said answer to M. H. Beach, Dubuque, Iowa.

4th. If defendant wishes to assail said amended petition by demurrer or motion, it must be done at the next term of said court & filed on or before Oct. 15th, 1873.

Dated Sept. 30, 1873.

(S'g'd) THOS. UPDEGRAFF,
*Of Counsel for Deft.*
M. H. BEACH,
*Of Counsel for Plff.*

(Endorsed:) Filed Oct. 10, 1873. George B. Corkhill, clerk.

62 Afterwards, to wit, on the 15th day of October, the same being of the October term, 1873, of said court, there appears in the records of the proceedings thereof in the said cause the following entry, to wit:

United States circuit court, district of Iowa, October term, 1873, Wednesday, Oct. 15, 1873.

TIM. KELLOGG
*vs.*
THE MILWAUKEE & ST. P. RY. CO. } No. 1192. Law.

This cause coming on for hearing, was continued as per stipulation filed.

63 Afterwards, to wit, on the 17th day of October, the same being of the October term, 1873, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, October term, 1873, Friday, Oct. 17, 1873.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL RY. CO. } No. 1192. Law.

This day this cause coming on by order of court, the same is specially assigned for trial on the 1st Wednesday of next term.

64 Afterwards, to wit, on the 19th day of January, 1874, there was file in said clerk's office by said deft. its answer to the amended petition; which said answer is in words and figures following, to wit:

In the circuit court of the United States, district of Iowa.

TIMOTHY KELLOGG, PLFF.,
*vs.*
THE MILWAUKEE & SAINT PAUL RAILWAY Company, dft. } Answer to amended petition.

Comes now the said defendant, and for answer to the amended petition of plff. herein says:

1st. That it denies each and every allegation in said amended petition contained.

2nd. That in the year 1863 the defendant became the owner and entered into the possession of a right of way for its railroad track 100 feet in width. That this right of way extended over and included the whole surface of lots 31 to 40, both inclusive in Geaia Land Company's river addition to the town of North McGregor, Clayton County,
65 Iowa. That said ownership has continued down to the present time. That said possession has so continued, except while wrongfully interrupted by plaintiff. That in the year 1871 the plaintiff, while the defendant was in the peaceable possession of the same, wrongfully entered upon said right of way over the lots aforesaid, and placed thereon the property which was destroyed, and for which he seeks in this suit to recover, and that the destruction thereof was in consequence of his own wrong.

Therefore defendant asks judgment for his costs.

(Signed) THOS. UPDEGRAFF,
*Of Counsel for Deft.*

(Endorsed:) Filed Jany. 19, 1874, as of Nov. 15, 1873, by stipulation of parties. George B. Corkhill, clerk.

66 On the same day there was filed in said clerk's office a stipulation of parties in said cause; which said stipulation is in words and figures following, to wit:

In the circuit court of the U. S., district of Iowa.

TIMOTHY KELLOGG, PLFF.,
*vs.*
THE MILWAUKEE & SAINT PAUL RAILWAY Co., dft. } Stipulation.

It is hereby stipulated and agreed that the clerk of said court may file the defendant's answer in said cause as of the 15th day of November, 1873.

Copy recd.
Dubuque, Iowa, Jany. 5, 1874.
(Signed) M. H. BEACH,
*Of Counsel for Plff.*

(Endorsed:) Filed Jany. 19, 1874. George B. Corkhill, clerk.

67 And on the 14th day of May, 1874, said plff., by his said attys., filed in said clerk's office his replication in said cause; which said replication is in words and figures following, to wit:

United States circuit court, district of Iowa, May term, 1874.

TIMOTHY KELLOGG
*vs.*
MILWAUKEE & ST. PAUL RAIL R. COM. } Replication.

Now comes the said plaintiff and denies each and every affirmative allegation contained in defendant's answer.

(Signed) SAMUEL MURDOCK,
MYRON BEACH,
*Attorneys for Plaintiff.*

Filed in my office this 14 day of May, 1874.
GEORGE B. CORKHILL,
*Clerk.*

68 On the 14th day of May, the same being of the May term, 1874, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874, Thursday, May 14, 1874.

TIMOTHY KELLOGG -
*vs.*
THE MILWAUKEE & ST. PAUL RAILWAY CO. } No. 1192. Law.

This cause came on this day for trial; plaintiff appeared by Beach & Murdock and defendant by Carey & Updegraff, and there came a jury of twelve good and lawful men, to wit, Wm. P. Lippincott, Wm. Graham, Abram Edwards, Hermann Reipin, R. H. McIntyre,

Howar Willey, E. C. Holt, B. F. Shaw, Samuel Reeves, James Burnett, J. B. Short, J. A. Archer, who were duly impaneled, and sworn to well and truly try the issues, and a true verdict give according to the law and evidence given in court, and they, having heard the
69 statement of case from counsel, and a portion of the evidence, were excused until to-morrow morning at 9 o'clock.

70 Afterwards, at the same term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874, Friday, May 15, 1874.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL RY. CO. } No. 1192. Law.

This cause came on this day to be further heard; parties appear by their attys., and the jury came the same as yesterday, and they, having heard further evidence, were excused until 9 o'clock to-morrow morning.

71 Afterwards, at the same term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

United States circuit court, district of Iowa, May term, 1874, Saturday, May 16, 1874.

TIMOTHY KELLOGG
*vs.*
THE MILWAUKEE & ST. PAUL RAILWAY CO. } No. 1192. Law.

This cause came on this day to be heard; the parties appear by their attorneys, and the jury came the same as yesterday, and they, having heard arguments of counsel and the charge of the court, retired to a private room, under charge of a sworn officer, to consider their verdict; and after some time spent in deliberation thereon, they return into open court the following verdict, to wit:

"1st. We, the jury, find that the elevator was burned from sparks emitted from steamer Jennie Brown.

72 "2nd. That such burning was caused by not using ordinary care and prudence in landing at the elevator under circumstances existing at that particular time.

"3rd. That the burning of the mill and lumber was the unavoidable consequence of burning of said elevator.

"We, the jury, therefore find for the plaintiff, and assess the damages at twelve thousand five hundred and two dollars & fifty cents, (12,502.50.)

(Signed) "WM. GRAHAM,
"*Foreman.*"

It is therefore considered and adjudged that plaintiff have and recover of and from defendant said sum of twelve thousand five hundred & two & $\frac{50}{100}$ dollars, ($12,502.50,) with interest & costs of suit, taxed at $ , and that execution issue therefor.

73 Afterwards, to wit, on the 18th day of May, 1874, said defendant, by its said attorneys, filed in said clerk's office an assignment of errors in said cause; which said assignment is in words and figures following, to wit:

In the circuit court of the United States for the district of Iowa.

TIMOTHY KELLOG
*vs.*
THE MILWAUKEE & SAINT PAUL RAILWAY Company. } Assignment of errors.

Comes now the said defendant and says that there is manifest error on the face of the record apparent in this cause in the following matters:

1st. The court erred in rejecting and excluding proof that the land on which mill and lumber was situated was owned by defendant, and that plaintiff's possession was wrongful.

74 2nd. The court erred in rejecting and excluding evidence that, owing to the intervening distance, the elevator was not an exposure to the mill and lumber.

3d. The court erred in submitting to the jury as a question of fact whether the burning of the mill and lumber was, under the circumstances, an expectable result of the burning of the elevator.

4th. The court erred in instructing the jury as set out in the bill of exceptions.

5th. The court erred in refusing to give to the jury the instructions asked the defendant and set out in the bill of exceptions.

(Signed) THOS. UPDEGRAFF,
*Of Counsel for the Deft. The Mil. & St. P. R. Wy. Co.*

(Endorsed:) Filed May 18, 1874. George B. Corkhill, clerk.

75 On the same day the said defendant, by its said attorney, filed in said clerk's office its bill of exceptions in said cause; which said bill of exceptions is in words and figures following, to wit:

In the circuit court of United States for the district of Iowa.

TIMOTHY KELLOGG, PLFF.,
*vs.*
THE MILWAUKEE & SAINT PAUL RAILWAY Company, deft. } Bill of exceptions.

Be it remembered that at the May term, A. D. 1874, of the court aforesaid, begun and held at the city of Des Moines, in the State of Iowa, on the 11th day of May, A. D. 1874—

Present, Hon. Samuel F. Miller, presiding judge—

On the 14th day of May, A. D. 1874, it being the fourth day of said term of said court, the above-entitled cause came on for hearing before Hon. Samuel F. Miller, presiding judge. A jury was duly empan-

76 nelled and sworn and the trial was continued to the jury thro' the 15th and 16th days of May, A. D. 1874. The plaintiff alleged that the fire which destroyed his property was negligently communicated from the defendant's steamboat Jesse Brown to an elevator built of pine lumber, & 120 feet high, belonging to the defendant, situated on the bank of the Mississippi River, and from the elevator to plaintiff's sawmill and lumber-piles, & while an unusually strong wind was blowing from the said elevator towards sd. mill & lumber.

On the trial it was admitted that the defendant owned the steamboat and elevator; that the Giard Land Company was the common source of title in both parties; that the said mill was five hundred and twenty-eight (528) feet from the elevator, and that the nearest of plaintiff's piles

of lumber was situated three hundred and eighty-eight feet (388) from the elevator. It was also admitted that there is a conflict between plaintiff and defendant as to the title of the land where the plaintiff's mill and lumber were burned. Plaintiff built the mill, and was
77 in the occupation of it, believing he had the right to be there. Thereupon the court refused to permit the parties to go into proof of title, because it was immaterial; to which ruling of the court the defendant, by its counsel, then and there at the time excepted and objected.

On the trial, also, the defendant offered to prove by witnesses who were experts and experienced in the business of fire-insurance, and accustomed by their profession to estimating and calculating the hazard and exposure to fire from one building to another, and to fixing rates of insurance, that owing to the distance between the elevator and the mill and the elevator and the lumber-piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon or in measuring the hazard or risk of mill or lumber; which evidence was objected to by the plaintiff, and the objection sustained, and said evidence excluded; to which ruling of the court the defendant, by its counsel, at the time objected and excepted.

And afterwards, on the said trial, the evidence being all sub-
78 mitted, the counsel for defendant asked and requested the court to instruct the jury as follows: "If you believe that sparks from the Jennie Browne set fire to the elevator through the negligence of defendant, and the distance from the elevator to the nearest lumber-pile was 388 feet, and to the mill 528 feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury is too remote from the negligence "to afford a ground for recovery;" which instruction the court refused to give to the jury; to which refusal the defendant, by its counsel, then and there at the time objected and excepted.

The court thereupon gave to the jury the following instruction:

"Was the burning of the mill and lumber the result naturally and reasonably to be expected from the burning of the elevator? Is it a result which, under the circumstances, would naturally result from the burning of the elevator? Was the burning of the mill and lumber
79 the result of the continued influence of the sparks from the boat without the aid of other causes not reasonably to be expected?"

To the giving of which instruction to the jury the defendant, by its counsel, at the time excepted and objected.

Therefore, defendant prays that this its bill of exceptions, setting forth the several exceptions, be made, allowed, and declared a part of the record in this cause; which is accordingly done in open court this 18th day of May, A. D. 1874.

Witness the hand of said Hon. Sam. F. Miller and the seal.

(Signed) SAM. F. MILLER. [SEAL.]

(Endorsed:) In open court. Filed May 18, 1874. George B. Corkhill.

80 On the same day there was filed in said clerk's office a writ of error in said cause; which said writ of error is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court, before you, between

Timothy Kellogg and the Milwaukee & Saint Paul Railway Company, a manifest error hath happened, to the great damage of the said Milwaukee & Saint Paul Railway Co., as by his complaint appears; and we, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on second Monday in October next, in the Supreme Court to be then and there held, that, the record and pro'eedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable M. R. Waite, Chief-Justice of the said Supreme Court of the United States, this 18th day of May, in the year of our Lord one thousand eight hundred & seventy-four, and of the Independence of the United States the ninety-eighth.

(Signed) GEORGE B. CORKHILL,
[SEAL OF COURT.] *Clerk C. C. U. S., Dist. of Iowa.*

Allowed.

SAM. F. MILLER, *Judge.*

(Endorsed:) Filed May 18, 1874. George B. Corkhill, clerk.

81 On the same day said defendant, by its said attys., filed in said clerk's office its supersedeas-bond, whis said bond is in words and figures following, to wit:

82 Know all men by these presents that we, The Milwaukee and Saint Paul Railway Company, as principals, and John Lawler, as surety, are held and firmly bound unto Timothy Kellogg in the full and just sum of twenty eight thousand ($28,000) dollars, to be paid to the said Timothy Kellogg, his certain attorneys, executors, administrators, and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a term of the circuit court of the United States for the district of Iowa, begun and held in said district, at Des Moines, on the 11th day of May, 1874, in a suit depending in said circuit court between Timothy Kellogg as plaintiff and The Milwaukee and Saint Paul Railway Company as defendant, judgment was on the 18th day of May, in the year aforesaid, rendered against the said Milwaukee and

83 Saint Paul Railway Company, on a verdict awarding to the said Timothy Kellog twelve thousand five hundred & two and $\frac{50}{100}$ dollars, the judgment being for the full amount thus awarded; and the said Milwaukee and Saint Paul Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse, in the Supreme Court of the United States, the judgment rendered in the aforesaid suit as aforesaid, and a citation directed to the said Timothy Kellogg, citing and admonishing him to be at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the consideration of the above obligation is such, that if the said Milwaukee & Saint Paul Railway Company shall prosecute the said

writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

84 (Signed) THE MILWAUKEE & SAINT PAUL RAILWAY COMPANY,
Per F. UPDEGRAFF, *Atty.*
JOHN LAWLER.

Signed, sealed, and delivered in the presence of—
M. H. BEACH.

I, John Lawler, do solemnly swear that I am a citizen of the United States and a freeholder and own and possess property in my own right worth more than double the amount of the penalty of the foregoing bond, over and above all debts, dues, liabilities, and exemptions; that my property in Iowa alone exceeds in value the amount of the said judgment.

(Signed) JOHN LAWLER.

Sworn to and subscribed before me this 18th day of May, 1874, by John Lawler.

[L. S.] GEORGE B. CORKHILL, *Clerk.*

I approve the foregoing bond and sureties.
May 17, 1874.

SAM. F. MILLER.

(Endorsed:) Filed May 18, 1874. George B. Corkhill, clerk.

85 On the same day there was filed in said clerk's office a citation; which said citation is as follows, to-wit:

UNITED STATES OF AMERICA, *ss:*

To Timothy Kellogg, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein The Milwaukee & Saint Paul Railway Company is plaintiff and Timothy Kellogg is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, justice of the said Supreme Court of the United States, this 18th day of May, in the year of our Lord 1874.

SAM. F. MILLER.

Service of the above citation is hereby accepted & receipt of copy acknowledged.
Des Moines, May 18, 1874.

M. H. BEACH,
*Of Counsel for Plff.*

86 In the circuit court of the United States for the district of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of the pleadings, papers, record-entries, and judgment-entry in a certain cause adjudicated in said court, wherein Timothy Kellogg was plaintiff and The Milwaukee and St. Paul Railway Co. was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the said court, at my office in Des Moines, in said district, this 21st day of September, A. D. 1874.

[SEAL.] GEORGE B. CORKHILL,
*Clerk U. S. C. C., District of Iowa.*

(Indorsement on cover:) No. 238. The Milwaukee & St. Paul Railway Company, plaintiff in error, vs. Timothy Kellogg. Iowa C. C. U. S. Filed 16th November, 1874.

# Supreme Court, United States.

OCTOBER TERM, 1876, No. 238.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

*Plaintiff in Error,*

*vs.*

TIMOTHY KELLOGG,

*Defendant in Error.*

PHILADELPHIA BAR ASSOCIATION

## Brief and Points for Plaintiff in Error.

JOHN W. CARY,
Of Counsel.

# Supreme Court, United States.

OCTOBER TERM, 1876, No. 238.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,

*Plaintiff in Error,*

*vs.*

TIMOTHY KELLOGG,

*Defendant in Error.*

PHILADELPHIA BAR ASSOCIATION

## Brief and Points for Plaintiff in Error.

JOHN W. CARY,
Of Counsel.

# SUPREME COURT.

## UNITED STATES.

OCTOBER TERM, 1876.—No. 238.

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THE MILWAUKEE & ST. PAUL RAILWAY COMPANY,

*Plaintiff in Error,*

*vs.*

TIMOTHY KELLOGG,

*Defendant in Error.*

This action was brought in Clayton County, Iowa, January Term, 1872, by the defendant in error, to recover the value of a certain saw mill, its fixtures and appurtenances, together with a quantity of lumber, destroyed by fire, which occurred at North McGregor, Iowa, October 3rd, 1871, and which it is alleged was caused by the negligence of the Company's employes in man-

aging and handling a certain steamboat on the Mississippi River, owned by the Company and engaged in transferring its cars across said river, between McGregor and Prairie du Chien. The action was removed by the defendant below into the Circuit Court for the District of Iowa, where it was tried at the May Term, 1874, and the jury returned a verdict of $12,502.50 for plaintiff, exceptions were filed and judgment entered, to reverse which the writ of error in this case is prosecuted. The plaintiff's complaint as amended is found on pages 9 to 15 of record, and sets forth that, on the 3d day of Oct., 1871, the plaintiff was the owner and in possession lots 31 to 40, both inclusive in the Giard Land Company's river addition to the town of McGregor, and had thereon and in operation a steam sawmill, a pump factory connected therewith, together with a lumber yard containing large quantities of lumber; all of the value of $19,892.50. That defendant was the owner and possessed of a grain elevator situate on lots 46, 47 and 48 of same addition, that said elevator was constructed of pine lumber, and not sheeted with iron and was used for storing grain, and that to facilitate the discharge of grain into boats and barges five or six openings were cut through the river side, of the dimensions of 15 or 18 inches, and about the same number of permanent spouts protruded from the side, and that there were a large number of windows and doors on different

sides of the elevator; and that said holes and spouts were carelessly left open; that said elevator was 60 feet long, 50 feet wide and 120 high; that it was very inflammable and was situated on a navigable channel of the Mississippi River, and was liable at all times during the season of navigation to be approached by steamers burning wood, and that no watchman was employed to guard it. That defendant was also the owner of the steamboat Jennie Brown, used in transferring cars between McGregor and Prairie du Chien, across said river; that said steamer wrongfully or improperly exhausted steam into her smoke-stacks; that defendant's servants did not manage said boat with skill, caution and watchfulness, and large quantities of sparks were thrown, and thereby plaintiff's property was consumed. Record, p. 12. That defendant omitted to use spark-arrestors or screens over the top of smoke-stacks, and thereby plaintiff's property was set on fire and consumed. Record, p. 12. That defendant unlawfully and illegally operated said steamboat without having a licensed captain, pilot or mate, and in consequence thereof plaintiff's property was consumed and destroyed. The complaint alleged that Henry Gilpatrick, pilot, was unfit to discharge his duties by reason of intemperance, and that Richard Welch, engineer, was unfit, and unqualified, and intemperate. Record, pp. 12 and 13. That at said time everything was exceedingly dry and inflammable, and re-

quired extreme caution; but said officers, agents, and servants in charge of said steamboat were guilty of carelessness and negligence. Record, p. 13. That a very high wind was blowing, amounting to a gale; and that an ordinarily prudent man would have refused to run a boat at such a time, and that defendant unnecessarily run near and alongside of said elevator, and worked their machinery while there, and caused large quantities of sparks to fly against said elevator and set the same on fire, and that cinders, sparks and coals of fire from said burning elevator were driven and blown by said wind among and into the piles of lumber and into and about and through the mill, whereby it took fire, &c. Record, pp. 13 and 14. Two other counts substantially the same as the last follow, claiming that the steamboat, while transferring cars on barges, run along by the side of the elevator, and there worked its engines and threw large quantities of sparks against the elevator and set it on fire, and that the wind carried the fire from the burning elevator to plaintiff's mills and lumber and set the same on fire, by means of which it was consumed. Record, pp. 14 and 15.

The answer is found on page 17 of record. The first answer is a general denial. The second answer states that defendant was the owner and in possession of said lots, Nos. 31 to 40, inclusive, on which said mill and property were situated, and that in 1871, while defendant was

so in the peaceable possession and ownership of said lots, and using the same as its right of way for its railroad, the said plaintiff wrongfully entered thereon and placed thereon the property so destroyed, and for which he seeks in this suit to recover, and that the destruction thereof was in consequence of his own wrong.

The complaint, in substance, alleges seven specific acts of negligence besides the general charge of unskillfulness, want of care and negligence generally in handling and managing the boat, as follows:

1st. That the holes and spouts through which grain was delivered from the elevator into boats were left open.

2nd. That no watchman was employed.

3rd. That the boat was so constructed as to exhaust its steam into the smoke-stacks.

4th. That no screens or spark-arrestors were used on the smoke-stacks.

5th. That the captain, pilot and mate were not licensed.

6th. That the pilot was intemperate, and the engineer incompetent.

7th. That the wind was so high and violent that an ordinarily prudent man would not have run a boat on the Mississippi River from fear of setting fire to buildings on the shore.

As to all of which there was a general denial.

Although not stated in the record, the fact is that the learned justice of this court, who tried

the cause, charged the jury as matter of law, that negligence in this cause could not be predicated upon either of the first three of the above allegations, but submitted the others to the jury with instructions to return a special verdict, and they, by their verdict, ignored the other four charges. Therefore, we can properly assume that on all the special matters of negligence alleged in the complaint, the plaintiff failed to sustain a cause of action. Hence the only matter left, upon which a verdict could be based, if upon anything, is the general allegation of negligence of the defendant.

The jury returned a special verdict in the words and figures following, to-wit:

"1. We, the jury, find that this elevator was "burned from sparks emitted from steamer Jennie "Brown

"2. That such burning was caused by not "using ordinary care and prudence in landing at "the elevator, under circumstances existing at "that particular time.

"3. That the burning of the mill and lum-"ber was the unavoidable consequence of burn-"ing of said elevator.

"We, the jury, therefore, find for the plaintiff, "and assess the damages at twelve thousand four "hundred and two dollars and fifty cents."

The defendant's counsel thereupon filed an assignment of errors which is found on page 20

of record. And on the same day filed a bill of exceptions as follows, (Record, pp. 20 and 21):

"On the 14th day of May, A. D. 1874, it being the fourth day of said term of said court, the above-entitled cause came on for hearing before Hon. Samuel F. Miller, presiding judge. A jury was duly empannelled and sworn, and the trial was continued to the jury through the 15th and 16th days of May, A. D. 1874. The plaintiff alleged that the fire which destroyed his property was negligently communicated from the defendants' steamboat, Jennie Brown, to an elevator built of pine lumber, and 120 feet high, belonging to the defendant, situated on the bank of the Mississippi River, and from the elevator to plaintiff's saw-mill and lumber piles, and while an unusually strong wind was blowing from the said elevator towards said mill and lumber.

On the trial it was admitted that the defendant owned the steamboat and elevator; that the Giard Land Company was the common source of title in both parties; that the said mill was five hundred and twenty-eight (528) feet from the elevator, and that the nearest of plaintiff's piles of lumber was situated three hundred and eighty-eight (388) feet from the elevator. It was also admitted that there is a conflict between plaintiff and defendant as to the title of the land where the plaintiff's mill and lumber were burned. Plaintiff built the mill, and was in the occupation of it, believing he had the right to be there. Thereupon the court refused to permit the parties to go into proof of title, because it was immaterial; to which ruling of the court the defendant, by its counsel, then and there at the time excepted and objected.

On the trial, also, the defendant offered to prove by witnesses who were experts

and experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposure to fire from one building to another, and to fixing rates of insurance, that owing to the distance between the elevator and the mill and the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard or risk of mill or lumber; which evidence was objected to by the plaintiff, and the objection sustained, and said evidence excluded, to which ruling of the court the defendant, by its counsel, at the time objected and excepted.

3. And afterwards, on the said trial, the evidence being all submitted, the counsel for defendant asked and requested the court to instruct the jury as follows: "If you believe that sparks from the Jennie Browne set fire to the elevator through the negligence of defendant, and the distance from the elevator to the nearest lumber pile was 388 feet, and to the mill 528 feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury is too remote from the negligence to afford a ground for recovery; which instruction the court refused to give to the jury; to which refusal the defendant, by its counsel, then and there at the time objected and excepted.

The court thereupon gave to the jury the following instruction:

"Was the burning of the mill and lumber the result naturally and reasonably to be expected from the burning of the elevator? Is it a result which, under the circumstances, would naturally result from the burning of the elevator? Was the burning of the mill and lumber the result of

the continued influence of the sparks from the boat without the aid of other causes not reasonably to be expected?"

To the giving of which instruction to the jury the defendant, by its counsel, at the time excepted and objected.

Therefore, defendant prays that this its bill of exceptions, setting forth the several exceptions, be made, allowed, and declared a part of the record in this cause; which is accordingly done in open court this 18th day of May, A. D. 1874.

Witness the hand of said Hon. Sam. F. Miller and the seal. [Signed]

SAM. F. MILLER. [SEAL.]"

## ASSIGNMENT OF ERRORS.

1st. The court erred in rejecting and excluding proof that the land on which the mill and lumber was situated was owned by defendant, and that plaintiff's possession thereof was wrongful.

2d. The court erred in rejecting and excluding evidence that owing to the intervening distance, the elevator was not an exposure to the mill and lumber.

3d. The court erred in submitting to the jury as a question of fact whether the burning of the mill and lumber was, under the circumstances, a natural or expectable result of the burning of the elevator.

4th. The court erred in instructing the jury as follows:

"Was the burning of the mill and lumber the

"result naturally and reasonably to be expected "from the burning of the elevator? Is it a re- "sult which, under the circumstances, would "naturally result from the burning of the eleva- "tor? Was the burning of the mill and lumber "the result of the continued influence of the "sparks from the boat without the aid of other "causes not reasonably to be expected?"

5th. The court erred in refusing to give to the jury the following instructions:

"If you believe that sparks from the Jennie "Brown set fire to the elevator through the neg- "ligence of the defendant, and the distance from "the elevator to the nearest lumber pile was 388 "feet, and to the mill 528 feet, then the proxi- "mate cause of the burning of the mill and lum- "ber was the burning of the elevator, and the in- "jury is too remote from the negligence, to afford "a ground for recovery."

## I.

*The Court erred in rejecting and excluding proof that the land on which mill and lumber was situated was owned by defendant, and that plaintiff's possession was wrongful.*

The plaintiff alleged that October 3rd, 1871, he was the owner and in possession of lots Nos. 31 to 40, the premises in question, (record, p. 10.) Defendant denied this allegation, and claimed that in 1863 it became the owner's there-

of and entered into possession and used the same as its right of way, which covered the whole of said lots, that its possession thereof has been continuous except as wrongfully interrupted by plaintiff in 1871, by placing said mill and lumber thereon. Record, p. 17.

The title, therefore, was directly in issue—by the pleadings. Defendant proposed to show that plaintiff was wrongfully there with his property. The plaintiff objected, and the Court sustained the objectioned and excluded the testimony.

*This testimony was material.*

1st. While it is not claimed that the plaintiff could willfully, maliciously or recklessly injure or destroy the property of a trespasser, or one wrongfully intruding upon its grounds or right of way, still the degree of care and caution due from defendant to such person or his property while so wrongfully there is very different from that due to one occupying his own premises, or a position to which he is entitled as a matter of right. One of the reasons for acquiring right of way one hundred feet in width is that the company may control that space and keep it clear of all structures or property that would be endangered by fire. The degree of care to be exercised by the company as respects its employes and those rightfully on its grounds, is very different from that to be exercised toward persons trespassing upon the track or right of way, or even those there by tacit permission, or license.

To hold otherwise would be to allow every one to take possession of portions of the company's property, *ad libitum*, and place their property thereon, and thereby greatly increase the responsibilities to which the defendant would be liable. The company could not be held for damages to such persons or property except it were shown that their conduct was wilful, malicious or reckless. The strict rule of ordinary care or negligence could not rightfully be applied. There is no pretense, in this case, that there was any such willful, malicious or reckless conduct, but only a lack of that care and caution which a prudent man would exercise in respect to persons and property on their own premises, or rightfully in the position in which the injury was sustained. The exclusion of this evidence prevented the defendant from asking any instruction as to the degree of care due or the negligence for which the defendant would be liable. Without it there was nothing in the case upon which to base such a request.

It is manifest that the degree of care or negligence due from the defendant to a party thus wrongfully on its premises cannot be the same as that required towards one rightfully there. Therefore, the testimony should have been admitted.

2d. The defendant at the time of the fire owed no duty to the plaintiff. Assuming that the defendant was the owner of these lots, and

that plaintiff was occupying them wrongfully or without defendant's consent, then *no act of omission* on the part of the defendant can be alleged as a ground of action against the defendant, for the reason that in such a case there is no relation between the parties that creates a duty. Plaintiff had no legal right to the premises, or to have his property there. Hence, although the defendant may have omitted the performance of some duty that would have been obligatory upon it as against a party rightfully in possession, such omission would not give the plaintiff a cause of action.

The special verdict in this case only finds that "the burning of the elevator was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time." It was, therefore, only an omission or non-feasance that caused the fire. The verdict does not find any positive or affirmative thing that was done by defendant, but only an omission. The verdict must govern in this respect, and bring the case within the rule. In Nicholson vs. Erie Railway Company, the duty omitted was a failure to set up the brakes or block the car-wheels, and the Court held that it was an omission or non-feasance, and therefore, within the rule. In this case several acts of misfeasance are alleged, but none of them proven. They are all ignored by

the special verdict, and only an omission or nonfeasance found as the cause of the fire.

Nicholson vs. Erie Railway Co., 41 N. Y., 525.

3d. The testimony was admissible as tending to show contributory negligence on the part of the plaintiff.

The plaintiff had no right to put his property on the defendant's right of way, and by so doing placed it in an exposed situation where it was likely to be destroyed by any fire that might occur from the defendant's locomotives or other machinery. The defendant was daily using steam in its business, both in its locomotives and boats, and necessarily so. Plaintiff's wrongfully placing his property on defendant's right of way was a voluntary putting of his property where it was in danger of being destroyed, and amounted to contributory negligence, which should bar a recovery. Grand Trunk R. R. vs. Richardson, 91 N. S., 454.

II.

*The court erred in rejecting and excluding evidence that owing to the intervening distance the elevator was not an exposure to the mill and lumber.*

The testimony offered was that of experts accustomed to examine and decide the extent to which property would be exposed to danger from

fire by the burning of any particular building. In other words, of estimating and determining what would be the natural or probable consequences of the burning of any particular building in respect to other property. The defendant offered to prove by their witnesses that the proximity of this elevator to their mills and this lumber was not such as to endanger them in the opinion of such experts, and not such that the risk of insurance would be increased thereby. In other words, that the natural and probable consequences of burning one would not be to consume the other.

*This testimony was material to the defence, and should have been received.*

1st. Ordinary care and negligence are relative terms. The standard is such care as an ordinarily prudent man would observe under the circumstances. That is in this case such care as an ordinarily prudent man would observe with respect to this mill and lumber while navigating a steamboat, in passing by or landing at this elevator. The question in this case is not the degree of care required to avoid setting fire to the elevator, unless the firing of the elevator, from its proximity to the mill and lumber, is to be considered as equivalent to firing them. But the true question is, what degree of care would an ordinarily prudent man have observed to avoid setting fire to the mill and lumber of plaintiff.

This brings us directly to the question of whether firing the elevator was equivalent to the firing of plaintiff's property. This proposition was denied on the trial, and this testimony was sought to be introduced to show that the natural, reasonable or expectable consequence of burning the elevator would not be to burn the mill and lumber, and if it was not such natural, reasonable or expectable consequence or result, then want of care or carelessness as respects the elevator, was not such want of care as respects this property, and while the conduct of defendant might not have evinced such care, with respect to the elevator, as an ordinarily prudent man would have observed, still that may be no evidence of a want of care as respects the plaintiff's mill and lumber. In other words, if the firing of the elevator would not, in the opinion of prudent men, qualified to judge, endanger the plaintiff's property, then acts of negligence on the part of the defendant, which only tended to endanger the elevator, would not be negligence as respects the plaintiff's mill and lumber. An ordinarily prudent man only exercises his care to prevent such acts as he knows, or should know, would produce injury. Consequently, if the defendant committed no act which it knew, or should have known, or which an ordinarily prudent and careful man would have known would cause injury, it can not be said that it was guilty of negligence.

Therefore, it was competent for the defendant to show, by the testimony of experts qualified to testify on the subject that the natural and reasonable consequence of burning the elevator would not be to injure, the plaintiff's property, or that in their judgment and opinion such would not have been the effect. Negligence in respect to the plaintiff's property cannot be predicated on any act of the defendant which could not reasonably or naturally be supposed would affect it.

2d. The Court submitted to the jury the question:

"Was the burning of the mill and lumber the "result, naturally or reasonably, to be expected "from the burning of the elevator? Is it a re- "sult which, under the circumstances, would nat- "urally result from the burning of the ele- "vator?"

Now, this testimony was upon this precise point, and if this was a question for the jury to pass upon, this testimony should certainly have been admitted. It tended directly to show that such was not the case. That the burning of the mill and lumber could not have been, and was not the natural result, or one to be expected from the burning of the elevator.

It is true that the mill and lumber were burned by this fire from the elevator, in this instance, but that such burning was a natural, reasonable or expectable result therefrom, is not proved

thereby. What other agencies intervened we know not. We are authorized to claim and insist, that with this testimony before them, the jury would never have made the 3d finding of their special verdict. No better evidence of what was reasonable, natural or expectable in snch a contingency, could be offered than the testimony of men skilled in judging in such cases, whose business required them to study, examine and judge preparatory to taking action that would involve them and their principals in loss, if they were mistaken. The very questions submitted to the jury in his charge, by the learned Justice, called upon them to find whether the result that happened in that particular case was the natural, reasonable and expectable result. That is, was it a result which an ordinarily prudent and careful man would have foreseen and guarded against? We cannot be charged pecuniarily, as for negligent conduct, where ordinary prudence cannot discern that negligence was committed. Otherwise a standard is erected which it is impossible for human beings to live up to. In this case we called, as witnesses, men skilled in judging of effects that might be produced by certain causes —experts. Their testimony was rejected, and the jury then instructed to find not only what did occur, but what was to have been naturally and reasonably expected to occur. We respectfully insist that the rejection of this evidence was error.

3d. This testimony was also competent as tending to show that the negligence of the defendant, whatever it may have been, was not the proximate cause of the plaintiff's loss. It tended to show that it was not the natural or reasonable result, and that some other cause must have conspired to produce the injury complained of. If the negligence of defendant was not the proximate cause of the plaintiff's loss, the defendant is not liable in this action. This testimony would have had a strong tendency to show that some other cause intervened to cause the burning of the defendant's mill. That a saw-mill over thirty rods distant from a burning building, standing on the banks of a river, in a populous town, should be suffered to take fire and burn down, is certainly a strange and unusual occurrence. It is hardly possible that it could have occurred without some other intervening cause. This testimony was, therefore, important and material in that view.

## III.

3d. *The court in submitting to the jury as a question of fact whether the burning of the mill and lumber was, under the circumstances, a result to be expected from the burning of the elevator.*

4th. *The court erred in instructing the jury as set out in the bill of exceptions.*

5th. *The court erred in refusing to give to the jury the instructions asked by the defendant as set out in the bill of exceptions.*

These three assignments of error may all be considered together and under one head, and depend upon the question *proximate* and *remote* negligence.

The defendant's counsel requested the court to instruct the jury as follows:

"If you believe that sparks from the Jennie "Browne set fire to the elevator through the "negligence of defendant, and the distance from "the elevator to the nearest lumber pile was 388 "feet, and to the mill 528 feet, then the proxi- "mate cause of the burning of the mill and lum- "ber was the burning of the elevator, and the "injury is too remote from the negligence to "afford a ground for recovery" (Record, p. 21.) which the court refused to give, and submitted to the jury the question as to whether the burning of the mill and lumber was the natural and reasonably to be expected result from the burning of the elevator, and the defendant excepted to the refusal and to the instruction given. Admitting for the argument that the defendant was guilty of negligence which caused the burning of the elevator, was the burning of the mill and lumber a legal consequence of that negligence? There is no dispute as to the distance from the elevator to the nearest lumber pile, 388 feet, or

to the mill, 528 feet, and the question arises should the court as matter of law have charged the jury as requested by the defendant? Was there anything in the case that required its submission to a jury? Was it proper that it should be so submitted? The jury empannelled to try the cause were called to pass upon seven or eight specific acts of negligence charged in the complaint. They ignore the whole of them, but, under the general allegation of negligence, return a verdict that the seamen in charge of the boat "*did not use ordinary care and prudence in "landing at the elevator under circumstances existing at that particular time.*" What the omission was we are not informed. They further found that the burning of the plaintiff's property "*was the unavoidable consequence of the burning of said elevator.*"

Under our system of jurisprudence we cannot object to the finding of a jury on a point properly submitted to them. But we are not forbidden to claim that certain matters must be decided by the court. The experience of corporations in trials before juries is not such as to induce them willingly to submit to their decision any question upon which they may rightfully claim the judgment of the court. Were it not that I might be charged with irreverence to the due course of the common law in trials by jury, I would suggest that this case furnishes an apt and forcible illustration of the unsuitableness of the

cumbrous machinery of such trials in questions of this nature, when we see twelve landsmen gravely passing upon and condemning the action and management of competent and experienced seamen in the handling of their boat while navigating the Mississippi river in a high wind. They do not deign to tell us wherein these seamen were at fault so that we could avoid it in future, or show that the ideas of the jury are inconsistent with good seamenship, but they do find that the corporation must respond in damages to the amount of the plaintiff's claim.

On the admitted facts of the case we insisted that the court should give the instruction asked by the jury, which was refused. The doctrine of proximate and remote negligence has recently received considerable attention both from the courts and elementary writers, and has developed not a little difference of opinion and some conflicting decisions.

In this case the sparks from the smoke-stack of the boat could not by any possibility reach the plaintiff's property; they might reach the defendant's elevator, and the elevator was disconnected from all other buildings and over thirty rods from the plaintiff's property, and it is claimed that the wind carried the fire through the air to the mill and set it on fire, and that therefore the negligence of firing the elevator was the proximate cause of firing the mill. Supposing we extend this doctrine. The thickly-

settled portion of the city of McGregor lies a half a mile or more distant from this mill, and is quite compact and built almost entirely of *pine, and very inflammable.* Supposing that fire from the mill had been carried by the wind directly to the city, or indirectly, either by seizing upon isolated buildings once in every thirty rods until the city was reached and the whole town consumed, would not the same principle that governs this case control in that, and would not the defendant, if liable here, be also responsible for the last house in the city consumed? The burning of the elevator and the blowing of the wind caused the plaintiff's mill to burn. The burning of the mill and the blowing of the same wind would cause the next building thirty rods away to burn, and so on to the city. Or if the wind was sufficiently strong, and other things favorable, the fire might have been carried directly from the elevator to the city. The sparks did endanger the elevator, but they did not reach or affect the mill. That was burned by the burning of the elevator; and so of the whole train of fires to the end of the city.

Would not the principle here contended for by the defendant in error have charged the person on whose premises in Chicago the first fire started, in either of their great fires, with the total loss of all property destroyed, provided a Chicago jury would find that he had been guilty

of some *omission* that caused the fire in the first instance?

It is evident that such a doctrine cannot be applied to the business of this country without subjecting nearly every important enterprise to ruin. Fire is a necessary element in the operation of railroads and steamboats, and no matter what precautions are taken, under favoring circumstances extensive fires will occur sufficient to ruin any company.

Among the cases recently decided is that of Ryan vs. N. Y. Central Railroad, in which the opinion was given by Mr. Justice Hunt. The case as stated in the opinion is as follows:

"On the 15th day of July, 1854, in the city of "Syracuse, the defendant by careless manage- "ment, or through the insufficient condition of "one of its engines, set fire to its woodshed and "a large quantity of wood therein. The plain- "tiff's house, situated at distance of 130 feet "from the shed, soon took fire from the heat and "sparks, and was entirely consumed, notwith- "standing diligent efforts were made to save it. "A number of other houses were also burned by "the spreading of the fire. The plaintiff brings "this action to recover from the railroad company "the value of his building thus destroyed. The "judge at the circuit non-suited the plaintiff, and "the general term of the Fifth District affirmed "the judgment."

The Court of Appeals affirmed the decision on the ground that the negligence of the defendant was the remote cause only of the damage.

In the case of Pennsylvania Railroad vs. Kerr, 6 Penn., 353, the same question was involved. In that case, "One of the locomotives of the "railroad company set fire to a warehouse situa- "ted near the track. The burning warehouse— "a brisk wind blowing at the time—communi- "cated its flames to several buildings, among "which was the hotel, situate 39 feet distant, "occupied by Kerr, and which contained personal "property belonging to him. The hotel and "property were consumed. In the court below "judgment was given against the railroad com- "pany for the value of the property, and an ap- "peal was taken by them."

The opinion is by Chief Justice Thompson, and discusses the subject at length, approves the judgment in the case of Ryan, and reverses the judgment of the Court below.

The case of Barron et al vs. Eldredge et al, 100 Mass., 455, was a case for negligence as warehouseman, whereby a quantity of wheat and flour were burned at Ogdensburg. The flour was stored in sheds on the track of the railroad, which the defendants were operating as trustees, and the wheat in an elevator extending into the St. Lawrence River, at a distance of some two hundred to two hundred and fifty feet from the buildings burned on shore, the intervening space being mostly covered by water. The fire was set by the locomotive, and consumed the sheds with the flour and extended from them to the elevator.

"On the argument the Court held there was

"evidence of negligence as to the burning of the "flour in the sheds, sufficient to be submitted to "a jury, but as to the wheat in the elevator they "said: The possibility of its destruction by fire, "communicated from such a distance, was too re- "mote according to the usual experience of man- "kind to justify a finding solely upon the evidence "afforded by its loss, that, in reference to the "property contained in it, the defendants did not "exercise due and ordinary care; and that in the "opinion of the Court there is no evidence upon "which the jury could find that the defendants "were guilty of negligence in respect to the ele- "vator and its contents."

I am aware that in Illinois and Wisconsin the Supreme Courts have disapproved of the decision in Ryan vs. Railroad, and Pennsylvania Railroad vs. Kerr, and have carefully read the decision of this court in the case of the Grand Trunk R. R. Co. vs. Richardson et al in 91 U. S., 454, and the case of Insurance Co. vs. Tweed, 7 Wallace, 44. I, however, respectfully submit that in none of these cases is there any warrant or authority for holding, in a case like the one at bar, that the negligence complained of is the proximate cause of the injury. It may well be that a building within twelve feet, as in 91, U. S. 454, or thirty-nine feet, as in the case of Kerr, the rule might be different. But when a space of over thirty rods intervenes, I submit that the decision of the Supreme Court of Massachusetts is correct: "That the possibility of its destruction

"by fire, communicated from such a distance, is "too remote according to the usual experience of "mankind."

JOHN W. CARY,
of Counsel for Plaintiff in error.

# Supreme Court of the United States,

OCTOBER TERM, 1876.

*No. 238.*

THE MILWAUKEE & ST. PAUL RAILWAY CO., Plaintiff-in-Error,

*vs.*

TIMOTHY KELLOGG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

## Brief of Defendant-in-Error.

MYRON H. BEACH,
*Counsel.*

WASHINGTON, D. C.:
W. H. MOORE, PRINTER, 511 ELEVENTH ST.
1877

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THE MILWAUKEE AND ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

TIMOTHY KELLOGG.

*In Error to the Circuit Court of the United States for the District of Iowa.*

## Statement of the Case.

On the 3d day of October, 1871, the defendant in error was in the possession of certain lots in Giard Land Company's addition to the town of McGregor, Iowa, on which he had erected a saw mill and pump manufactory, and also on which he had piled and stored a large quantity of manufactured lumber and sawed timber. He had been in the undisturbed and undisputed possession of the lots for some years.

At the same time the plaintiff in error was the owner of a large grain elevator, 528 feet above the plaintiff's saw mill, and 388 feet above the lumber piles. The elevator was constructed of pine lumber in the usual manner of constructing elevators, and had spouts, and above these openings 15 to 18 inches square on the east or river side, for the purpose of discharging grain into boats, &c.

Both the elevator and saw mill were on the west bank of the Mississippi river, and close to the water's edge. To

the west of them, and at a distance of about 75 feet, extended a nearly precipitous bluff, parallel to the river and 350 to 400 feet high. The elevator is just below the point of the bluff, where a deep ravine extends westerly from the river, up which the railroad of the plaintiff in error extends, in the State of Iowa.

The space between the elevator and the lumber piles was vacant.

On the date above named the plaintiff in error was the owner of a steamboat called the "Jennie Brown," which was employed by the plaintiff in error in transferring cars back and forth between the ends of its road at Prairie du Chien, on the Wisconsin, and North McGregor on the Iowa side of the Mississippi river.

A severe drought had prevailed for over six weeks in this locality, and everything was very dry and combustible.

On the day above named, a very strong wind was blowing in the direction from the elevator to the saw mill and lumber—while the wind was thus blowing, the Jennie Brown was run in to and landed at the elevator, with two barges loaded with box or freight cars. There was no occasion for landing at the elevator, and that was not the point of destination but the point at which she was to land for the purpose of transfering the cars on the barges which she was towing was the transfer track, 800 or 900 feet farther up the river. A row of piles were driven along the edge of the channel, and between it and the shore, from the end of the transfer track to within one hundred and fifty or two hundred feet of the elevator. The Jennie Brown could have conveniently landed alongside these piles at any point below the transfer track.

Between the elevator and the south end of the row of piling there was the rocky shore.

The pilot of the Jennie Brown landed to wait till another Steamboat, the "Allamakee," also engaged in transfering cars, should get away from the landing at the transfer track.

As soon as the Allamakee left the landing at the end of the transfer track, the Jennie Brown, in indeavoring to leave the elevator, grounded one of her barges loaded with cars on the rocks just above the elevator; while working to get the barge off, the elevator was suddenly discovered to be on fire. So rapidly did the fire extend that the Jennie Brown was obliged to cut the lines of the grounded barge and escape.

The plaintiff alleged and proved that the Jennie Brown had no spark arresters on her smoke-stacks; that she escaped her exhaust steam into the smoke-stack to increase the draft of her furnaces; that she had unusually long furnaces which gave her a great draft without the increase given by the exhaust steam; and that she was worse than other boats of her class in throwing out from her smoke-stacks large quantities of sparks and coals of fire.

It was also alleged and shown that the spouts and openings in the elevator were left open, and that the openings were just the hight of the smoke-stacks of the Jennie Brown. The elevator had been unused for several weeks; was locked, and no watchman was in charge of it. The agent of the plaintiff in error, at North McGregor, had the key, and no person had entered it for more than three weeks.

Witnesses testified that they stood on the shore close to the elevator and steamboat, watching the effects of the latter to get the barge off the rocks, and saw the smoke blown directly from the stacks against the elevator. Other witnesses on a steamboat tied up to the west shore of the Island, at a distance of about eight hundred feet from the elevator, and on the opposite side of the channel, while also watching the efforts of the "Jennie Brown," saw the flames about the center of the elevator. "The flames ran up and spread out over the side of the elevator like following a train of gunpowder or kerosene." The alarm was given from that steamboat, by the ringing of its bell and the blowing of its whistle, before it was observed by those

on board of the "Jennie Brown." So rapidly did the fire extend, from the dry and combustible condition and character of the material of which the elevator was constructed, and the accumulation of dry and inflammable dust, both outside and in, that persons, the witnesses of plaintiff in error, who were not more than two thousand feet distant when the fire was first discovered and the alarm given, were not able to reach it before the whole structure was enveloped in flames. The "Jennie Brown" was obliged to cut the line by which she was attached to the grounded barge, in order to escape burning.

The steamboat above referred to, "The Iowa," which was lying on the opposite side of the channel tied up, was employed in the same business as the "Jennie Brown," transferring cars; but those in charge of her refused to run her that day, or after a few trips in the morning, because not prudent or safe to do so by reason of the difficulty in managing a steamboat in such a wind as was then blowing and the danger of communicating fire.

The wind was so strong that, as shown by undisputed evidence, the air was so filled with dust before the fire occurred, that a person could see but a short distance. Men employed in grading the road-bed of the Chicago, Dubuque and Minn. Railroad in that immediate vicinity, were obliged to abandon their work several hours before the fire on account of the severity and violence of the wind. The force of the wind was so great that long pieces of blazing plank and boards were torn from the burning elevator and blown upon and among the lumber piles of the defendant in error, and blazing brands and fragments several feet in length from the elevator were blown into and through the saw-mill. An idea of the intensity of the heat occasioned by the burning of such a structure as that elevator—one hundred and twenty feet in height, built wholly of dry and resinous pine and fanned by a wind of the strength of that which blew that day—may be formed from the fact that all

the trees and bushes on the side of the bluff were not only killed, but consumed, to a distance of over six hundred feet below the elevator. The air was filled with fire beyond the lumber and mill of the defendant in error; and all were on fire as shown by the evidence in less than twenty minutes after the elevator was set on fire. The lumber, timber, and other products were with the mill and all machinery totally destroyed.

It was also alleged and proved that the pilot and engineer of the "Jennie Brown" were and had for years been habitually intemperate, and had been discharged from other steamboats on account of their intemperate habits. It was also proved that the plaintiff in error knew that these men possessed these habits.

It was also proved by experienced steamboat men that it was not prudent to run a steamboat at that place in such a wind, and dangerous to land at or even approach near the elevator under the conditions and circumstances of that day on which the fire occurred.

No other origin of the fire was offered than that it was occasioned by negligence in the use of the "Jennie Brown."

The following is the verdict of the jury:

1st. We the jury find that the elevator was burned from sparks emitted from the "Jennie Brown."

2d. That such burning was caused by not using ordinary care and prudence in landing at the elevator under the circumstances existing at that particular time.

3d. That the burning of the mill was the unavoidable consequence of burning said elevator.

We the jury therefore find for the plaintiff, and assess the damages at twelve thousand five hundred and two 50,100 dollars, ($12,502.50.)

## ARGUMENT.

The plaintiff in error presents but three points for consideration in its assignment of errors.

1st. Because it was not permitted to offer testimony to show that the land on which the mill and lumber were situated was owned by the defendant.

2d. Because testimony was excluded offered to show that the distance between the elevator and the mill and lumber was greater than some Insurance Agents consider an exposure.

3d. Because the Court submitted as a question of fact to be determined by the jury whether the burning of the mill and lumber was under the circumstances an expectable result.

The other errors assigned as the giving and refusing instructions are involved in the above.

The defendant in error possessed the title in fee simple of the land on which the mill and lumber were. He had been in the open and undisturbed possession thereof for some years. He had erected his mill and his manufactory thereon, and had there stored and piled his lumber and other manufactured products. The plaintiff in error had never demanded possession of the lots—had never told the defendant in error that it claimed to be the owner of them. They were not on the line of the road, but beyond the terminus or side track which was built to the elevator while it was private property. No suit was pending—none was even brought by the plaintiff in error or any other party for the possession of these lots—none to establish its claim to the ownership, first made known on the trial of this case when the testimony was offered.

The testimony was properly excluded, because immaterial.

It was no defence in this action brought by defendant in error to recover damages for the destruction of his property through the negligence of the plaintiff in error. It

will not be permitted to quietly stand by and see the defendant in error erect his mill on these lots, manufacture and store his lumber there, and while in unsuspicious security he is engaged in his business thereon, on the 3d day of October, 1871, set fire to the mill and lumber, under circumstances that insure their complete destruction, either wilfully, maliciously, or even negligently, and then say in defence, when damages are demanded, "the land is mine, and I am not responsible for damages." The defendant in error was not a trespasser on these lots. He had purchased them, paid for them; had received a deed for them, and was lawfully in possession of them.

Grand Trunk R. R. Co. *vs.* Richardson *et al.*, 1 Otto, 468.
Bains *vs.* R. R. Co., 42 Vt., 38.
R. R. Co. *vs.* Derby, 14 How., 485.
Ingersoll *vs.* R. R. Co., 8 Allen, 440.

II.

The rules which insurance companies or agents may adopt for their convenience or purpose in determining what distance might be beyond exposure, are immaterial and incompetent as evidence in this case. Distance does not determine exposure. The circumstances and conditions do that; and these must be considered in each case, because they are peculiar to it. No general rules can, with any safety or justice, be adopted. A distance that would be considered as beyond all danger of exposure when everything was wet would be wholly otherwise after a long-continued drought such as that section had experienced at that time. On the day of this fire, any object fifty or one hundred feet to the windward of this blazing elevator might not be an exposure, while everything at a distance of over six hundred feet south, and to the top of a bluff three hundred and fifty feet high, was exposed to certain destruction. A distance that would be no expo-

sure under certain circumstances, might be imminent under others.

III.

The third is the only point on which any reliance, we think, is placed by the learned counsel for the plaintiff in error. This reliance, if any really exists, is based solely on two cases.

Ryan v. N. Y. C. R. R. Co., 35 N. Y., 210; and
Kerr v. Pa. R. R. Co., 62 Pa. St., 353.

But both of these cases have been practically overruled. The former in

Webb v. R. W. & O. R. R. Co., 49 N. Y., 420,
and the latter in

Pa. R. R. Co. v. Hope, 2 Vol. of Weekly Notes of Cases 386, recently decided by the Supreme Court of Pennsylvania, and not yet otherwise published. Those cases stand alone, and the conclusions reached were on facts and circumstances peculiar to them.

This question was fully considered and the law correctly stated by this Court in

Tweed v. Ins. Co., 7 Wall., 44;

And in the instructions of Mr. Justice Miller, before whom with Judge Dillon, this case was tried. These with a report of this case prepared by Judge Dillon, appear in 1st Vol. Central Law Journal, 278.

The case is also incorporated in the text of Wharton on Negligence, Sec. 154, as containing the correct exposition of the law. It has been redeclared by this Court in

Grand Trunk R. R. Co. v. Richardson *et. al.*, 1 Otto, 468.

I also refer especially in addition to the authorities above cited to the following:

Scott v. Shepherd, 2 W. Black, 893.
Vaughan v. Menlove, 32 E. C. L., 219.

Piggott v. Eastern Cos. R'y Co., 54 Id., 229.
Hart v. W. R. R. Co., 13 Met., 99.
Ross v. B. & W. R. R. Co., 6 Allen, 87.
Ingersoll & Quigley v. S. & P. R. R. Co., 8 Id., 438.
Trask v. H & N. H. R. R. Co., 2 Id., 331.
Perley v. Eastern R. R. Co., 98 Mass., 414.
Safford v. B. & Me. R. R. Co., 103 Id., 583.
Higgins v. Dewey, 107 Id.
Powell v. Dewey, 3 Cush., 30.
Guille v. Swan, 19 Johns, 381.
Field v. N. Y. C. R. R. Co., 32 N. Y., 339.
*Kellogg* vs. *C. & N. W. R. R. Co.*, 26 Wis., 223.
Spaulding v. Same, 30 Id., 110.
Pindar v. T. P. & W. R. R. Co., 53 Ill., 447.
*Fent* v. *T. P. & W. R. R. Co.*, 59 Ill., 349.
Hull v. Sacramento Valley R. R. Co., 14 Cal., 387.
Clevelands v. Grand Trunk Ry. Co., 42 Vt., 449.
Cooks v. Champlain Nav'g'n Co., 1 Den., 90.
Anderson & Young v. Cape Fear Steamboat Co., 64 N. C., 399.
*Quebec Fire Assurance Co.* v. *St. Louis*, 7 Moore, P. C. C., 286.

There remains but one other point to which I wish to call the attention of the Court.

This case was tried in May, 1874. The writ of error was sued out the same term, and it, with the bill of exceptions was in the office of the clerk of this Court in June, 1874. The plaintiff in error took no steps to file the same, and it was at the commencement of the October Term, 1874, dismissed on motion of the defendant in error. It was, however, afterwards restored on motion of the plaintiff in error.

The defendant in error lost by the negligence of the plaintiff in error all the capital he possessed except the lots on which his mill and lumber stood. He has been obliged to follow the plaintiff in error over the most tedi-

ous and expensive route of litigation in which it could lead him. His property all destroyed, he has been obliged to meet the expenses of this litigation and await the necessary delays of three years before he can be heard and his rights determined in this Court, where plaintiff in error has brought him. No argument or brief has yet been filed or served by its learned counsel.

I respectfully ask that these facts and circumstances be taken into consideration by the Court with the questions of error presented, and that if the action of the Court below be affirmed that it be with interest, costs, and the damages provided under the rules of the Court.

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